A

Public Prosecutor v Wong Wei Choon

B HIGH COURT (MUAR) — CRIMINAL TRIAL NO 45–1 OF 2006
LAU BEE LAN J
19 APRIL 2007

C *Criminal Procedure — Sentence — First Offender — Adequacy of sentence — Public Interest — Whether custodial sentence more appropriate — Whether Court should exercise discretion to detain accused at Henry Gurney School*

D *Criminal Procedure — Sentence — Plea of guilty — Common intention to commit culpable homicide amounting to murder — Accused person together with a person still at large — Whether accused person who pleaded guilty should be given discount on sentence — Penal Code ss 34 & second limb of 304*

E *Criminal Procedure — Sentence — Mitigation — Public Interest — Assaulting a public servant*

F *Evidence — Cross-examination — Failure to cross-examine certain paragraphs in the written plea of mitigation — Whether certain paragraphs objected by the prosecution in the plea of mitigation admissible*

G The accused was originally charged, together with another person still at large, in furtherance of a common intention to commit murder under s 302 of the Penal Code ('the PC') read with s 34. Subsequently, the accused pleaded guilty to an alternative charge under the second limb of s 304(a) of the PC. The accused was under 18 years of age at the time of the commission of the offence. Counsel for the accused tendered a written plea of mitigation, to which the prosecution objected to certain paragraphs therein. The Court was asked to exercise its discretion to send the accused to a Henry Gurney School pursuant to s 76 of the Child Act 2001.

H

Held:

I (1) The Court upheld the prosecution's objection to certain paragraphs in the written plea of mitigation. The accused had admitted to the facts of the case without qualification. The paragraphs which were objected to had not been subjected to any cross-examination and there are no means by which the Court can verify the truth of any provocation on the part of the deceased or that a person called Ah Fook suddenly appeared and assaulted the deceased (see para 5).

(2) The Court agreed that there were no extenuating circumstances in this case. On the contrary, notwithstanding the absence of any dangerous weapon being used, the accused's reaction to the deceased upon being dissatisfied with the latter's denial regarding the former's allegation that the latter had stolen his wallet which the former had handed over to the latter for safekeeping, was indeed disproportionate in the circumstances. This is borne out by the facts that the accused had assaulted the deceased with his hands several times on his head, nose and body, more particularly, after each assault, which caused the deceased to fall to the cement floor of the basketball court, upon which the deceased picked himself up, and the same process went on thrice until the fourth occasion when the deceased could no longer lift himself up and thereafter succumbed to the injuries sustained. The deceased, a 15-year old child did not retaliate throughout whilst the accused had to be restrained by a friend (see para 10).

(3) The Court was also mindful that the gravity of the offence to which the accused had pleaded guilty is reflected by the intention of the legislature in extending the punishment provided under the second limb of s 304(a) of the PC from 20 years to 30 years and also being liable to a fine (see para 12).

(4) The public interest would best be served if the accused is given a custodial sentence and the accused is sentenced to six years imprisonment, with the sentence to run from the date of arrest (see para 12).

[Bahasa Malaysia summary

Tertuduh pada asalnya dituduh bersama dengan seseorang yang masih bebas berikutan kepada niat bersama kedua-duanya untuk melakukan pembunuhan di bawah s 302 Kanun Keseksaan, dibaca bersama dengan s 34. Seterusnya, tertuduh telah mengaku salah kepada pertuduhan pilihan di bawah bahagian kedua s 304(a) Kanun Keseksaan. Tertuduh adalah di bawah umur 18 tahun semasa melakukan kesalahan. Peguam untuk tertuduh mengemukakan rayuan mengurangkan hukuman bertulis, di mana pendakwaan telah membantah sesetengah perenggan di dalamnya. Mahkamah telah diarahkan untuk menggunakan budi bicaranya untuk menghantar tertuduh ke Sekolah Henry Gurney menurut s 76 Akta Kanak-Kanak 2001.

Diputuskan:

(1) Mahkamah membenarkan bantahan pendakwaan kepada perenggan-perenggan tertentu dalam rayuan mengurangkan hukuman bertulis. Tertuduh telah mengaku kepada fakta-fakta kes tanpa kelayakan. Perenggan-perenggan yang dibantah tidak tertakluk kepada sebarang pemeriksaan-balas dan tiada cara bagi mahkamah untuk menentusahkan kebenaran sebarang provokasi di pihak si mati dan seseorang yang bernama Ah Fook yang tiba-tiba muncul dan menyerang si mati (lihat perenggan 5).

(2) Mahkamah bersetuju bahawa tiada keadaan-keadaan pengurangan dalam kes ini. Sebaliknya, walaupun tidak menggunakan sebarang senjata yang berbahaya, tertuduh telah bertindak berikutan ketidakpuasan hati terhadap

penafian si mati berkenaan dengan dakwaan sebelumnya bahawa si mati telah mencuri dompetnya yang dikembalikan semula oleh si mati kepada tertuduh untuk simpanannya adalah sebenarnya tidak dapat dipertimbangkan dalam keadaan-keadaannya. Ia adalah bertitik tolak daripada fakta-fakta bahawa tertuduh telah menyerang berkali-kali kepala, hidung dan badan si mati dengan tangannya, khususnya selepas setiap serangan yang menyebabkan si mati terjatuh ke atas lantai simen gelanggang bola keranjang, yang mana si mati telah bangun, dan proses sama ini berterusan sebanyak tiga kali sehingga pada keadaan keempat si mati tidak dapat bangun dan selanjutnya menyerah kepada kecederaan yang dialami. Si mati, seorang budak berumur 15 tahun, tidak membalas sebaliknya tertuduh terpaksa dihalang oleh seorang rakannya (lihat perenggan 10).

(3) Mahkamah juga berwaspada terhadap beratnya kesalahan yang mana tertuduh telahpun mengaku salah dicerminkan dengan niat penggubal undang-undang untuk melanjutkan hukuman yang disediakan di bawah bahagian kedua seksyen 304(a) Kanun Keseksaan daripada 20 tahun kepada 30 tahun dan juga denda (lihat perenggan 12).

(4) Kepentingan awam adalah lebih baik lagi jika tertuduh diberikan hukuman jagaan, dan tertuduh dijatuhkan hukuman 6 tahun penjara, dengan hukuman berkuatkuasa dari tarikh tangkapan (lihat perenggan 12).]

Notes

For cases on first offender, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3448–3454.

For cases on plea of guilty, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3626–3652.

For cases on mitigation, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3606–3613.

For cases on cross-examination, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1068–1083.

Cases referred to

Koay Teng Soon & Anor v PP [2000] 2 MLJ 129 (refd)
Lim Yoon Fah v PP [1971] 1 MLJ 37 (refd)
Nordin Yusmadi Yusoff v PP [1997] 3 MLJ 754 (refd)
PP v Francis Kuin [2006] 6 CLJ 103 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Low Kian Boon & Ors [2006] 6 MLJ 254 (refd)
PP v Nazarudin bin Ahmad & Ors [1993] 2 MLJ 9 (refd)
PP v Yap Huat Heng [1985] 2 MLJ 414 (refd)
R v Ball (1951) 35 Crim App Rep 164 (refd)
Tan Bok Yeng v PP [1972] 1 MLJ 214 (refd)
Teh Yew Whatt v PP [1958] MLJ 171 (refd)
Teo Siew Peng & Ors v PP [1985] 2 MLJ 125 (refd)
Veerian T Latchmanen v PP [2001] 7 CLJ 466 (refd)
Yong Pak Yong v PP [1959] MLJ 176 (refd)

Legislation referred to
Child Act 2001 ss 2(1), 76
Penal Code ss 34, 302, 304(a)

Haslinda bte Abu Bakar (Deputy Public Prosecutor).
Kalaichelvan a/l Kannan (Vijaya Gopal & Associate) for the accused.

Lau Bee Lan:

[1] The offender, Wong Wei Choon was originally charged, together with another person still at large, in furtherance of the common intention of both of them to commit murder under s 302 of the Penal Code ('the PC') read with s 34 of the same (exh P2) when he first appeared in this Court on 20 February 2006. Subsequently, the prosecution preferred an alternative charge under s 304(a) second limb of the PC (exh P3) on 10 April 2007 as follows:

> Bahawa kamu pada 16 Mei 2004 antara jam lebih kurang 10.00 malam hingga 11.30 malam di Gelanggang Bola Keranjang, Taman Perumahan Layang-Layang, dalam daerah Kluang, di dalam Negeri Johor Darul Takzim, telah menyebabkan kematian LEONG TEIK LEE (K/P No: 890307-07-5523) 'dengan niat menyebabkan kecederaan-kecederaan yang menyebabkan kematian. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 304(a) Kanun Keseksaan.

[2] The accused is represented by his counsel Mr Kalaichelvan. The accused pleaded guilty to the alternative charge and understood the nature and consequences of his plea. He admitted, inter alia, to the facts of the case (exh P4), First Information Report, Layang-Layang Police Report No 000409/04 (exh P5), the arrest report, Kluang Report 004536/04 (exh P6), sketch plan and key of the scene of incident (exh P7 and exh P7K), the post-mortem report (exh P8), 10 photographs of the scene of the incident (exh P9 A–J) and 18 photographs of the deceased prior and after post-mortem (exh P10A–R). The Court thereafter found the accused guilty and convicted him accordingly. The matter was adjourned to 18 April 2007 for the tendering of the probation report duly tendered through the Probation Officer and marked as exh P20, which was admitted by the offender.

[3] It would be appropriate at this juncture to reproduce the salient facts of the case as follows:

(1) Pada 16 Mei 2004 jam lebih kurang 10.00 malam, LEONG TEIK LEE (simati, berumur 15 tahun 2 bulan) dan beberapa orang rakan sedang berada di kawasan Gelanggang Bola Keranjang, di Taman Perumahan Layang-Layang, Kluang, Johor.

(2) Pada masa itu, tertuduh telah datang ke tempat simati dan menuduh simati mencuri wang tertuduh kerana simati telah memegang dompet tertuduh semasa tertuduh terlibat dalam satu pergaduhan dengan satu kumpulan lain pada jam 8.30 malam, 16 Mei 2004, di tempat yang sama. Simati menajikan ada mengambil wang tertuduh.

(3) Tertuduh tidak puas hati dengan jawapan simati. Berlaku pertengkaran mulut dan tertuduh telah memukul simati menggunakan tangan. Seterusnya tertuduh telah tumbuk simati banyak kali di kepala, hidung dan badan. Selepas ditumbuk dan

dipukul, simati sebanyak 3 kali di atas lantai simen gelanggang bola keranjang itu. Setiap kali selepas jatuh akibat dipukul, simati akan bangun balik. Pada setiap kali simati bangun, tertuduh akan tumbuk simati pada bahagian kepala, muka dan badan sehingga simati jatuh. Pada kali keempat selepas dipukul, simati jatuh dan tidak bangun lagi. Simati jatuh terbaring dalam keadaan terlentang di atas lantai simen gelanggang bola keranjang itu. Simati tidak membalas pukulan dari tertuduh.

(4) Seorang rakan simati telah menghampiri tertuduh dan menarik tangan tertuduh dari memukul simati. Tertuduh meronta-ronta manakala simati baring terlentang di dalam keadaan darah keluar dengan banyaknya dari mulut, telinga dan hidungnya. Seorang saksi melihat simati mengerang kesakitan dan tangan simati mengigil. Rakan simati telah mendapatkan bantuan untuk membawa simati ke Hospital Kluang. Selepas simati dihantar ke Hospital Huang, tertuduh kemudiannya diambil oleh bapa tertuduh.

(5) Simati telah disahkan meninggal dunia pada 16 Mei 2005 semasa berada di Hospital Kluang.

(6) Bedah siasat ke atas simati mengesahkan punca kematian adalah 'Head injuries due to blunt force trauma'. Punca kematian adalah disebabkan oleh objek tumpul dan keras. Selain daripada itu, terdapat beberapa kecederaan lain pada bahagian badan, peha dan kepala simati. Laporan bedah siasat bertarikh 17 Mei 2004 yang disediakan oleh Doktor Mohamad Azaini bin Ibrahim adalah berkaitan.

[4] On behalf of the offender, his Counsel tendered a written plea in mitigation together with authorities. The learned DPP has taken objection to certain paragraphs in the written plea in mitigation, namely:

(1) Paragraph 6, part thereof commencing from 'Di dalam pertengkaran tersebut si-mati telah memaki pesalah dan keluarga pesalah dengan perkataan-perkataan lucah serta mencabar pesalah dan juga mengugut untuk memanggil Han Jik dan kawan-kawannya'.

(2) Paragraph 7, the whole.

(3) Paragraph 8, the whole.

[5] Upon review of the facts of the case vis-à-vis the paragraphs objected to above, I find that I am in agreement with the learned DPP that her objection ought to be sustained because the accused had admitted to the facts of the case without qualification and the paragraphs objected to above by the prosecution, in my view, have not been subjected to any cross-examination and there is no means by which the Court can verify as to the truth of any provocation on the part of the deceased or that a person called Ah Fook suddenly appeared and assaulted the deceased. Therefore, save for the fact that there was a 'pertengkaran mulut' as per para 3 of the facts of case, I am not prepared, as suggested by learned counsel for the offender, to assume that by virtue of the undisputed fact that there was an argument, by implication the deceased challenged the offender by using offending language against him and his family and threatened to call a person named Han Jik and his friends, and by extension there was provocation.

[6] Learned counsel for the offender has urged the Court in the exercise of its discretion to send the offender to a Henry Gurney School pursuant to s 76 of the

Child Act 2001 ('the Act') upon the following grounds and mitigating factors: plea of guilt, clean antecedent of the offender, feeling of regret and remorse on the part of the offender, co-operation with the police, duration of the offender being under remand from 16 May 2004 until to date (for about 2 years and 11 months), the age of the offender during the commission of the offence being approximately 17 years and 6 months and the circumstances in which the offence was committed, namely, the act was not planned and no dangerous weapon was used. To substantiate his submission, learned counsel cited various authorities namely (1) *Teh Yew Whatt v PP* [1958] MLJ 171; (2) *Nordin Yusmadi Yusoff v PP* [1997] 3 MLJ 754; (3) *Lim Yoon Fah v PP* [1971] 1 MLJ 37; (4) *PP v Francis Kuin* [2006] 6 CLJ 103.

[7] On the other hand, the learned DPP vigorously opposed any show of leniency submitting basically on the premise that public interest demands a deterrent sentence as the offence committed by the offender was a serious offence, the conduct of the offender was disproportionate to what the deceased did, no extenuating circumstances existed during the commission of the offence and the changing trend of conduct of offenders with regard to the commission of crimes wherein custodial sentence was imposed. In support thereof several cases were cited: (1) *PP v Yap Huat Heng* [1985] 2 MLJ 414; (2) *Yong Pak Yong v PP* [1959] MLJ 176; (3) *PP v Low Kian Boon & Ors* [2006] 6 MLJ 254; (4) *Veerian T Latchmanen v PP* [2001] 7 CLJ 466; (5) *Tan Bok Yeng v PP* [1972] 1 MLJ 214; (6) *Koay Teng Soon & Anor v PP* [2000] 2 MLJ 129; (7) *PP v Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9.

[8] In the oft-cited passage of Hilbery J in the case in *R v Ball* [1951] 35 Crim App Rep 164, consistently followed by our Courts (see *PP v Loo Choon Fatt* [1976] 2 MLJ 256; *Teo Siew Peng & Ors v PP* [1985] 2 MLJ 125; *PP v Nazarudin bin Ahmad & Ors*), His Lordship stated:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is ± within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in resard to each crime, but in resard to each criminals the court has the risht and the duty to decide whether to be lenient or severe. (Emphasis added).

[9] In the instant case it is not disputed that the offender has pleaded guilty to the alternative charge and has therefore saved much of the Court's time and expenses; he was a child within the definition of 'child' under s 2(1) of the Act as he was a person under 18 years of age at the time of commission of the offence; he was a first offender; the offence was not planned and no dangerous weapon was used; the offender extended cooperation to the police; he has been in remand since the date of arrest ie

16 May 2004; the offender did not show much academic inclination having on his own volition declined to continue his education after Form 2 as his studies were unsatisfactory and instead worked as a contract worker with his uncle between 2001 and 2004 earning a daily income of about RM30 to RM40 out of which he gives RM100 to his mother to be kept as savings; he did not have much parental guidance (save for the company of his grandmother) presumably because his parents were busy with their jobs, his father has worked as a logger for the last 10 years which takes him away from the home as he stays at the workers' longhouse whilst his mother works as an operator in a microchip factory in Singapore and only returns home during the weekends; and he is remorseful over his past conduct and promises to reform himself.

[10] As against this backdrop, the Court cannot ignore the particular circumstances under which the offence was committed. I agree with the learned DPP that there are no extenuating circumstances as what the learned defence counsel attempted to show for the reasons which I have alluded to earlier. On the contrary, notwithstanding the absence of any dangerous weapon being used, I find the manner the offender reacted to the deceased upon being dissatisfied with the denial of the latter regarding the former's allegation that the latter had stolen his wallet which the former had handed over to the latter for safekeeping, was indeed disproportionate in the circumstances as submitted by the learned DPP. This is borne out by the fact that the offender had assaulted the deceased with his hand several times on his head, nose and body, more particularly, after each assault which caused the deceased to fall to the cement floor of the basketball court, upon which the deceased picked himself up, and the same process went on thrice until the fourth occasion when the deceased could no longer lift himself up and thereafter succumbed to the injuries sustained as per the post mortem report. There were marks of injury seen on the head, body and limbs of the head. These injuries were consistent as being due to blunt trauma. Internal examination showed a base of skull fracture and injuries to the brain. These injuries were fatal' and the cause of death being 'Head injuries due to blunt force trauma'. The deceased, a child of the tender age of 15 years, did not retaliate throughout the unfortunate episode whilst the offender had to be restrained by a friend.

[11] I am conscious of the case of Francis Kuin which I had the occasion to decide and which was cited by the learned defence counsel to persuade the Court to similarly send the offender to a Henry Gurney School under s 76 of the Act. However it is to be noted that the facts and circumstances of that case can be distinguished from the present case.

[12] The Court is also mindful of the gravity of the offence to which the offender has pleaded guilty which is reflected by the intention of the legislature in amending the punishment provided under the law for the offence of s 304(a) (second limb) of the PC with imprisonment which may extend to 30 years instead of 20 years (vide the Penal Code Amendment Act A1210/2003 which came into effect from 6 March 2007) and shall also be liable to a fine. Weighing all the factors together, I am of the view that the public interest would be best served if the accused is given

a custodial sentence and, in this regard, the offender is sentenced to six years imprisonment and the sentence is to run from the date of arrest ie 16 May 2004.

The offender is sentenced to six years imprisonment.

Reported by Lee Shih